In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-38

MIKE BRUCE, ET AL., *Appellants,*

vs.

WICHITA STATE UNIVERSITY, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS APPEAL

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Appellee moves that the appeal herein taken be dismissed on the grounds that it does not present a substantial federal question and that the judgment below rests on an adequate nonfederal basis.

STATEMENT

This appeal has been taken from a decision rendered by the Supreme Court of Kansas holding that the Kansas governmental immunity statutes offend no state or federal constitutional provision. *Brown* v. *Wichita State University*, 219 Kan. 2, 547 P.2d 1015 (1976). The statutes at issue, K.S.A. 46-901, 902 and 903, provide that the State of Kansas and its agency institutions are immune from liability and suit on an implied contract or for negligence or any other tort except where specifically authorized by law.

ARGUMENT

I. There Is No Substantial Federal Question.

Although this appeal has been taken from a decision of the highest court of the State of Kansas in which the constitutionality of a state statute was upheld, jurisdiction will not lie if the appeal presents no substantial federal question. *Zucht* v. *King*, 260 U.S. 174 (1922). Appellants contend that a substantial federal question is presented because the court below held that the Kansas statute did not violate the equal protection clause of the Fourteenth Amendment. This tautological argument, however, will not sustain jurisdiction when confronted with the tests which this court has set forth.

A. This Court Has Consistently Upheld the Doctrine of Governmental Immunity.

This court defined the standards by which a substantial federal question can be determined in *Zucht* v. *King*, where it held *inter alia* that if a question has previously been decided there is no substantial federal question, 260 U.S. at 176.

In order to rule on the issues raised by appellants, it is necessary to strike down a state governmental immunity statute, something this court has refused to do from the very beginning of the constitutional scheme under which this country operates. The doctrine of governmental immunity rests upon the premise of common law that the sovereign cannot be sued without its consent. As expressed in *Palmer* v. *Ohio*, 248 U.S. 32, 34 (1918):

> "The right of individuals to sue the state in either federal or a state court cannot be derived from the

> Constitution or laws of the United States. It can only come from the consent of the state . . . Whether Ohio gave the required consent must be determined by the construction to be given the Constitutional Amendment quoted and this is a question of local state law as to which the decision of the state supreme court is controlling with this court, no federal right being involved."

The court also upheld in principle *In The Matter of the State of New York*, 256 U.S. 490, 497 (1920):

> "That a state may not be sued without its consent is a fundamental rule having so important a bearing upon the construction of the Constitution of the United States that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against the state without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; *and not even one brought by its own citizens because of the fundamental rule of which the Amendment is but an exemplification.* (Emphasis added)."

See also *Beers* v. *State of Arkansas*, 61 U.S. (20 How.) 527 (1857) and *Hans* v. *Louisiana*, 134 U.S. 1 (1889).

Appellants seek to overcome this obstacle by arguing that a substantial federal question is presented because this court has not previously considered governmental immunity within the context of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Yet this court has consistently refused to review cases brought on appeal from state courts which specifically rejected equal protection arguments. In *Crowder* v. *Department of State Parks*, 228 Ga. 436, 185

S.E.2d 908 (1971), *appeal dismissed,* 406 U.S. 914 (1972), an action was brought on behalf of a minor who was injured in a fall in a state park. The Supreme Court of the State of Georgia held that the doctrine of sovereign immunity did not violate either the state or federal constitution, although the complaint had specifically alleged that the doctrine as codified in Georgia law violated equal protection under the designated provisions of the United States and Georgia Constitutions. The lower court held, however, that the doctrines had continued in force since a statutory enactment of 1784; and any abrogation of the statutory policy was best left to the legislative branch of government. 185 S.E.2d at 911.

Similarly in *Krause* v. *Ohio,* 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), *appeal dismissed for want of a substantial federal question,* 409 U.S. 1052 (1972), *reh. denied,* 410 U.S. 918 (1973), a case arising out of the shooting of students at Kent State University, an action was brought for wrongful death and survivorship against the State of Ohio. The Ohio State Supreme Court held that where the Ohio Constitution required legislative action to abrogate governmental immunity, there was no violation of he equal protection clause of the Fourteenth Amendment. 285 N.E.2d at 745. In both of these cases, this court dismissed the appeals although the equal protection argument had been throughout the lower court proceedings.

Finally, certiorari was denied in *Harris* v. *Pennsylvania Turnpike Commission,* 410 F.2d 1332 (1969), *cert. denied,* 396 U.S. 1005 (1970). There the driver of a tractor-trailer, injured while on the Turnpike, sought to recover damages for negligence. The lower federal court held that the Commission's immunity from liability was a matter of state law. Moreover, the court rejected plaintiff's contention that the immunity statute denied equal protection

as an unreasonable classification between property owners, who were permitted to recover for trespass, and travelers, who were not permitted to recover for negligence. 410 F.2d at 1335-36.

In none of these three cases has the assertion of an equal protection argument been deemed a substantial federal question such that it warranted this court's review of state statutes or constitutions which provided for a system of governmental immunity.

B. The Kansas Governmental Immunity Statute Is Reasonably Related to Legitimate State Ends.

Appellants assert that they are not challenging the doctrine of governmental immunity *per se* but rather the Kansas statute. Yet, the highest state court of Kansas examined the Kansas immunity statute in light of all constitutional objections and held that the statute, albeit creating some classifications, does not unduly discriminate against any class of person. As stated in the majority opinion below:

> "If K.S.A. 46-901, *et seq.,* does create a discriminatory classification that classification is reasonable and thus not violative of the equal protection clause. In the absence of a suspect classification or violation of a fundamental right, a statutory discrimination should not be set aside *if any state of facts reasonably may be conceived to* justify it." *Brown, et al.* v. *Wichita State University,* 219 Kan. at 16, 547 P.2d at 1027.

Indeed all legislative classifications are not suspect: "Statutes create many classifications which do not deny equal protection; it is only invidious discrimination which offends the Constitution." *Ferguson* v. *Skrupa,* 372 U.S.

726, 732 (1963). The power to establish such classifications rests with the legislatures of the respective states. *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

> "Although no precise formulation has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that in practice their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. at 425-426.

See also *Tigner* v. *Texas,* 310 U.S. 141 (1939) and *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1972), *reh. denied,* 411 U.S. 959 (1973).

Appellants would substitute their judgment and that of the Court for the legislature of the State of Kansas which reacted swifty and authoritatively to a judicial abrogation of a judicially created doctrine of government immunity when it enacted K.S.A. 46-901 et seq. *Brown,* 219 Kan. at 6, 547 P.2d at 1020. Appellants argue that the rationale for the statute is inadequate and cite the minority opinion. Yet the majority in choosing to uphold the legislative enactment considered not only arguments of the parties but also amicus briefs filed by representatives of the State of Kansas, the Kansas State Senate, the Kansas House of Representatives, and the Kansas Legislative Coordinating Council. The amicus briefs filed by the two bodies of the state legislature present particularly strong

evidence that the legislative intent and purpose in enacting the statute has not changed and remains strong.

Among the interests and rationale identified by the Kansas court as justifying the statute are: (1) the necessity to protect the state treasury, (2) the fact that immunity enables the government to function unhampered by the threat of time and energy consuming legal actions, and (3) that immunity affords a degree of protection demanded by numerous administrative and high risk activities undertaken by the various governments. *Brown,* 219 Kan. at 16-17, 547 P.2d at 1027-1028. Thus, the state legislature has deemed it necessary to create classifications for the bringing of court actions which distinguish between the state and others, and which distinguisn between implied contract and tort actions and other actions brought against the state.

No contention has been made that such classifications have been applied in discriminatory manner. Rather appellants argue that the classifications themselves are suspect. Yet, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they are the same." *Tigner* v. *Texas,* supra at 147. It is obvious that any immunity statute will create classifications; but the issue of which classification scheme should be adopted is clearly a policy judgment. As phrased in *Ferguson* v. *Skrupa,* 372 U.S. at 730:

> "Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' "

There may be dissent and controversy regarding the rationale for this statute. But if this court chooses to paint this particular immunity statute with a broad brush of unconstitutionality, it would substitute its judgment for that of the legislature of the State of Kansas.

C. The Court Need Not Reach the Constitutional Issue to Provide Relief.

It is unnecessary to resolve the Constitutional issues raised by appellants in order to afford them relief or fairly dispose of the question below. If it is possible to dispose of the case on a non-constitutional basis, the courts should refrain from determining constitutional issues touching on sensitive areas of broad social policy. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941).

Appellants originally sued on two theories—tort and contract. The contract theory asserted that the victims of the aircraft crash were third party beneficiaries of an agreement placing upon Wichita State University the obligation of purchasing liability insurance coverage for passengers in accordance with FAA and CAB regulations. See *Brown* v. *Wichita State University*, 217 Kan. 279, 284-91, 540 P.2d 66, 73-77 (1975). Thus, the court below ruled in this the "first Wichita State case", that the plaintiffs have claims for relief that may be pressed under a contract theory. *Brown, id.*

The liability insurance requirements as set forth by regulations of the Civil Aeronautics Board (14 C.F.R. §§298.41 et seq. Subpart D.) would permit appellants to recover, if successful at trial, the minimum limits of liability, seventy-five thousand dollars ($75,000) for any one passenger, and for each occurrence an amount equal to the sum of $75,000 multiplied by seventy-five percent

(75%) of the total number of passenger seats in the aircraft (14 C.F.R. §298.42[a][1]).

Although the amount of damages recoverable in a tort action brought in contravention of the immunity statute are not settled, it is clear that some upward limit would apply. If the Kansas statute in effect at the time of the crash were applied, plaintiffs would be limited in their recovery to fifty thousand dollars ($50,000) actual damages. K.S.A. 60-1903; L.1970, Ch. 241, §1. If the lower court applies the law of Colorado, the place of the actual accident, recovery would be limited to forty-five thousand dollars ($45,000) if decedent left neither a spouse, minor child, nor dependent parent; otherwise, the measure of damages would be unlimited. Colo. Stat. 41-1-3, as amended 1969 HB 1055.

Appellants, therefore, have available to them a contract action which could result, pending a favorable determination, in recovery exceeding that permitted by the wrongful death acts in force at the time of the crash. The ruling on the contract claim in the initial decision was not disturbed on rehearing. *Brown*, 219 Kan. at 23, 547 P.2d at 1029-1030. This being the case, there is no valid reason for this court to approach the constitutional issues asserted in order for appellants to gain relief below. The doctrine of judicial restraint should apply when no substantial federal question remains to be resolved in order to allow appellants their day in court.

II. The Judgment Rests on an Adequate Nonfederal Basis.

Both the United States Constitution and the Constitution of the State of Kansas are silent on the question of the state's immunity from suit. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Carroll* v. *Kittle*, 203 Kan.

841, 457 P.2d 21 (1969). This silence is not accidental. Governmental immunity has its roots in the common law doctrine of sovereign immunity and the state legislatures legitimately possess the power to establish the immunity policy which will govern in their respective states.

The Constitution of the State of Kansas grants all legislative power to the House of Representatives and the Senate (Art. 2, §1). Thus in Kansas, as well as most other states, nothing indicates that the state legislature is not empowered to occupy the governmental immunity field. In fact, in at least nine jurisdictions judicial abrogation of judicially imposed governmental immunity has been followed by at least limited legislative reimposition of immunity. *Brown,* 219 Kan. at 9, 547 P.2d at 1021.

By holding that the state has the power to impose governmental immunity, the court below recognized that it is the state's function to govern its own liability. This principle is fundamental and may be reached without considering the constitutional issues. As stated in *Beers* v. *State of Arkansas,* 61 U.S. (20 How.) 527, 529:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or in any others without its consent and permission; but it may if it thinks proper, waive this privilege and permit itself to be made a defendant in suit by individuals or by another state. And as this permission is all together voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued and the manner in which the suit shall be conducted and may withdraw its consent whenever it may suppose that justice to the public requires."

See also *McGowan* v. *Maryland,* 366 U.S. at 425-26.

It is this basic legal premise, outside any federal or constitutional consideration which justifies retention of governmental immunity. As the Kansas court stated, nearly every state in the Union recognizes a need for immunity in functions characterized as governmental. *Brown,* 219 Kan. at 12, 547 P.2d at 1024.

CONCLUSION

This appeal fails for want of substantial federal question. This court has previously considered and ruled on the validity of governmental immunity and has consistently refused to hear cases in which equal protection arguments have been asserted. In this case, the equal protection argument must fall in the face of a valid legislative classification which, given a rational set of facts this court should not overturn. This conclusion is particularly appropriate since the constitutional issue need not be reached in order to afford appellants relief. Finally, the decision below rests on adequate nonfederal grounds given the common law doctrine of governmental immunity and the power of the various state legislatures to impose that doctrine following any judicial abrogation thereof.

It has not been contended that the Kansas immunity statute can be set apart or distinguished from other such statutes. Nor has any contention been made that the Kansas statute has been applied discriminatorily. Thus, appellee respectfully submits that the State of Kansas and its agency institutions should not be singled out, and that

this court should refuse to consider the well settled doctrine of governmental immunity in this case.

Respectfully submitted,

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